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No. 85-875.

In the
Supreme Court of the United States.

OCTOBER TERM, 1985.

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
PETITIONER,

v.

LUIGI MANOCCHIO,
RESPONDENT.

Opposition to Petition for Writ of Certiorari to the Supreme Court of Rhode Island.

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Question Presented.

Whether this Court should review the decision of a state court of last resort reversing a conviction in a case turning on the credibility of one witness where the accused was erroneously precluded from cross-examining that one witness about mental problems effecting his recall of the events at issue and where that witness' credibility was already suspect given admitted multiple perjuries in prior trials, all of which led the state court to find "an obvious danger here that [the witness'] testimony involved far more recitation than recollection."

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STATE OF RHODE ISLAND AND
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LUIGI MANOCCHIO,
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Opposition to Petition for Writ of Certiorari to the Supreme Court of Rhode Island.

Statement of the Case.

This case does not present the federal question framed by the State of Rhode Island in its Petition for Writ of Certiorari. Contrary to the state's contention, the Supreme Court of Rhode Island did not ground its decision in this case, and has not grounded its decisions in other cases, upon a "per se reversible error" doctrine which requires reversal of a conviction without

regard for whether the defendant was prejudiced by error (Pet. i).[1] Indeed the Rhode Island Court has found harmless error under the standard of *Chapman* v. *California*, 386 U.S. 18 (1967) or its state-law equivalent in several recent confrontation cases. *E.g.*, *State* v. *Soto*, 477 A.2d 945 (R.I. 1984); *State* v. *Anthony*, 422 A.2d 921 (R.I. 1980).

The phrase in the opinion below which belatedly[2] prompted this petition — "per se error" — is a red herring. This term, as used by the state supreme court, is simply a summary expression of the combined error and prejudice which necessarily ensues when "a trial justice *totally precludes* cross-examination by defense counsel of the *state's key witness* on the issues of motive or bias." *State* v. *Parillo*, 480 A.2d 1349, 1357 (R.I. 1984) (emphasis supplied). The phrase has not been applied outside these narrow parameters. In fact it has been employed only where, as here, the restriction on cross-examination occurred in an essentially one-witness case and effectively barred a classic avenue of impeachment. *See*, *State* v. *Parillo*, *supra*; *State* v. *Freeman*, 473 A.2d 1149 (R.I. 1984); *State* v. *DeBarros*, 441 A.2d 549 (R.I. 1982). Thus, by its definition and the very terms of its application, "per se error" as used by the Rhode Island Court involves a determination of prejudice more than sufficient to meet the *Chapman* test.

In the present case, the Rhode Island Court cited to *Parillo*, *Freeman*, and *DeBarros* for "guidance" (A. 8), but in fact and law founded its decision to reverse on a careful exposition of the plain, indeed blatant, prejudice which flowed from the

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[1] Respondent uses the following abbreviations throughout: "Pet." for the State's Petition for Writ of Certiorari; "A." for the State's Appendix to Petition for Writ of Certiorari; "Tr." for citations to the record below.

[2] The state did not voice its objections to Rhode Island's so-called "per se error" rule until its Petition for Reargument, filed after the decision was rendered below App. 11 *et. seq.* *See*, Part III *infra* arguing that the issue presented to this Court for review was not adequately raised below.

frustration of respondent's efforts to expose the defects in the memory of the only witness to adduce evidence against him.

This was a one-witness case. The state presented virtually all of its evidence of guilt through the mouth of one John "Red" Kelley, a notorious and self-proclaimed thief and high-jack artist. Halfway through trial the state revealed that Kelley had committed multiple perjuries[3] before the grand jury which had indicted respondent and in the three trials of co-defendants which preceded this one.[4] Then, in a mid-trial voir dire, Kelley broke down on the witness stand, admitting he was suffering from serious mental problems which were affecting his memory:

> Q. Mr. Leppo [defense counsel]: Are you suffering from any disease that affects your memory?
> A. Yes. Yes. [Witness starts to cry.]
> * * *
> Q. Would you tell us what disease you have that affects your mind and memory?
> A. I have — I'm, I'm being treated for many different things, and premature Alzheimer's, I think it is.
> Q. And does that affect your memory, sir?
> A. Yes, it does.
> Q. And does that affect your thought process?
> * * *
> A. It does.
> * * *
> Q. Has that affected your recall as to certain events?
> A. It does affect it, yes.

[3] The state's wilful failure to disclose the prior perjuries of its star witness until the fourth day of trial is the subject of a number of claims of error which were not reached by the Rhode Island Court.

[4] Kelly's testimony secured convictions only in the first of these trials. The next two juries which listened to him returned verdicts of acquittal.

Q. And how often does this happen?
A. When I tell you I can't remember a thing, its an honest answer.

(A. 3-4.)

Respondent sought a hearing on the witness' competency but was summarily denied (A. 4).[5] Extrinsic evidence of the witness' mental failings was impossible to obtain because Kelley had been a denizen of the witness protection program for some fifteen years. As the state supreme court recognized, "Manocchio's only hope for acquiring information about Kelley was through the use of cross-examination." (A. 6.) But trial counsel was permitted only four preliminary questions on the matter exposed at the voir dire before the trial court slammed the door on further cross-examination (A. 4-5, 8).

The Supreme Court of Rhode Island found that the questions which respondent was permitted to pose to the witness failed to give the jury an adequate basis for assessing the witness' credibility (A. 8). It then stressed that this was a one-witness case where "the jury's determination of whether or not to convict [respondent] rested *entirely* upon its assessment of Kelley's competency and veracity." (A. 9.) (Emphasis supplied.) And finally, it pointed out that this one witness was guilty, by his own admission, of multiple perjuries in prior proceedings. Thus the court concluded there was "an obvious danger here that Kelley's testimony involved far more recitation than recollection." (A. 9-10.)

These findings, not an abstract rule of law, were the basis of the Rhode Island Court's finding of "clear error, violating both Manocchio's Sixth Amendment right to confront the wit-

[5] This ruling is the subject of yet another claim of prejudicial error which was not reached by the court below.

nesses against him and Art. I, Sec. 10, of the Rhode Island Constitution." (A. 10.) This conclusion does not constitute an erroneous extension of the holding in *Davis* v. *Alaska*, 415 U.S. 308 (1974) as the state would have it (Pet. 7-8). To the absolute contrary, it is a wholly unremarkable application of confrontation principles to a demonstrably prejudicial denial of the respondent's right to a minimally adequate cross-examination of his only accuser.

Argument.

I. This Case does Not Present the Issue Framed by the Petition for Writ of Certiorari.

A. *Introduction.*

The State of Rhode Island has attempted to place this case upon a procrustean bed of reversible error without regard for prejudice. It cannot be made to fit.

Prejudice is an integral part of "per se error" as that term is used by the Supreme Court of Rhode Island. It is simply a shorthand way of stating the obvious: that certain restrictions on cross-examination are so devastating to the truth-seeking process as to plainly require a new trial. Every case to use the phrase "per se error" anchors its reasoning in the critical importance of the witness being examined and the significance of the impeachment which was frustrated by the trial court. No Rhode Island case has found reversible error in the absence of a showing of prejudice.

The present case is no exception. The decision below cites two prior so-called "per se error" cases for "guidance," but its

ultimate conclusion to reverse is squarely based on the patent prejudice suffered by respondent when the trial court foreclosed all inquiry into Kelley's admitted problems with his memory.

The state has confused a form of words for a substantive issue. This Court, however, "reviews judgments, not statements in opinions." *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297-298 (1956). The petition should be denied.

B. *The Supreme Court of Rhode Island Found Prejudicial Error in This Case.*

This case shrieks of prejudicial error. The state's sole witness, an admitted thief and perjuror, testified under oath in a voir dire that he had "problems" with his memory and that he was "being treated for many different things, and premature Alzheimer's, . . ." (A. 3). Yet when he went before the jury, he testified in nearly seamless detail to a complex criminal conspiracy occurring more than fifteen years earlier. Cross-examination about his earlier admissions was stopped in its tracks.

The Rhode Island Court began its analysis of respondent's claim of error by reciting the holdings in its recent cases of *Anthony*, *DeBarros*, *Freeman* and *Parillo*. While noting that these cases established a "per se error" rule (A. 7), the court stressed that they involved plainly erroneous restrictions on the cross-examination of *e.g.*, "the *only eyewitness* to the victim's murder" (A. 7, discussing *State* v. *Freeman*, *supra*) (emphasis supplied), and "the *sole living eyewitness* to the victims' murders." (A. 8, discussing *State* v. *Parillo*, *supra*) (emphasis supplied).

The Rhode Island Court characterized its citation to these cases as being "for guidance" (A. 8). It then embarked on a careful exegesis of the prejudice stemming from the limitation of cross-examination at the trial below.

First, the Rhode Island Court found that the questions which defense counsel was permitted to ask did not sufficiently apprise the jury of Kelley's memory problems (A. 8). The state now disputes this conclusion, asserting that the court ignored numerous instances at trial where Kelley admitted failures of memory (Pet. 4, 10). This complaint is somewhat audacious given the fact that the state's brief below never identified these "repeated assertions of absence of memory." (Pet. 4.)[6] But more to the point, it is simply incorrect. The truth is that Kelley exhibited before the jury a singularly good memory for events occurring nearly fifteen years prior to his testimony.[7] He was a consumate witness, whose "failures of recollection" came largely when defense counsel was endeavoring to pin him down on specific dates in an ultimately futile effort to set up a partial alibi. *E.g.*, Tr. 1322-1329.

Kelley's lack of memory on these particular points is in marked contrast to the detail of the rest of his testimony, fostering the suspicion that these uniquely convenient memory lapses might have been more tactical than real. In any event, far from assisting the defense as the state suggests, most of these admissions not only appeared normal, given the fifteen-year time lag, but permitted the state to finesse the alibi defense which had so undermined Kelley's credibility in prior trials.

In short, not only is there no indication that the Supreme Court of Rhode Island failed to determine the adequacy of the defense opportunity to test Kelley's memory, but the record plainly shows that the jury in fact received a wholly false picture of the only significant witness in the case.

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[6] *See*, Part III *infra* claiming that the state failed to raise properly below the issue which it now seeks to bring before this Court.

[7] Respondent apologizes for this blanket assertion of fact but he knows of no other way, short of delivering the transcript, to rebut the state's wholly inaccurate characterization of Kelley's testimony in this case.

The Rhode Island Court then went on to find that questions exploring memory problems were proper, indeed critical cross-examination in light of Kelley's voir dire admissions.

> Where counsel is able to demonstrate that through either passage of time or an intervening mental disease the witness is incapable of recollecting the events in question, or of distinguishing fact from fiction, the most essential element of the witness' value and reliability has been destroyed.

(A. 9.) This conclusion is plainly correct.[8] Indeed the state does not appear to dispute it. Instead, the petition suggests that respondent's cross-examination sought inadmissible medical conclusions from the witness (Pet. 10-11). Not only is this

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[8] Commentators state without exception that evidence of memory impairment is admissible to impeach a witness' credibility. Thus *Wigmore* notes that "any defect of capacity . . . involving less than the normal testimonial capacity, should legitimately discredit the witness, carrying whatever weight it may have in a given case, . . .", 3A Wigmore on Evidence, § 931, p. 758 (Chadbourn Revision, 1970); and hence that "(a)n impairment of memory caused by disease or by old age or idiocy . . . should be admissible." *Id.* at § 934, p. 766 (footnote and emphasis omitted). *Underhill* flatly states that "any evidence which tends to show that the witness' mind or memory is impaired or feeble is admissible to discredit him, and this is true though the court has ruled that the witness is competent to testify." 1 Underhill's Criminal Evidence, § 235, p. 711 (6th ed. 1973). Tracy notes that "evidence may be received of any disclosed impairment of the mental powers of the witness from the use of drugs, from disease, from senility, or from nymphomania." Tracy, Handbook of the Law of Evidence, p. 189 (N.J. 1952). American Jurisprudence is the same: "questions on evidence tending to show that the mind and memory of the witness are impaired by disease or otherwise, or are in a feeble condition, are competent to discredit the testimony." 81 Am.Jur. 2d, Witnesses, § 540, p. 541 (1976) (note omitted); *accord*, 98 C.J.S., Witnesses, § 461, pp. 326-327 (1983) ("it may be shown that the witness has a mind or memory impaired from disease or other cause; . . .").

incorrect," but it is wholly a matter of state law which was definitively decided against the state below.

In the final part of its opinion, the Rhode Island Court squarely addressed the question of prejudice: "[i]n the case presently before us, an exploration of Kelley's possible memory defects was especially warranted." (A. 9.) It noted that Kelley "was the only witness who could link Manocchio with the fifteen-year old murders. . .", and hence "the jury's determination of whether or not to convict him rested entirely upon its assessment of Kelley's competency and veracity." (A. 9.) Finally, it observed that Kelley was testifying for the fourth time, "all of his prior testimony (having been) tainted in significant respects with perjury." (A. 9.) Based on these factors the court found that "(t)here was an obvious danger here that Kelley's testimony involved far more recitation that recollection." (A. 10.) The conclusion followed immediately:

> *For these reasons* we find in line with our prior case law that the trial justice's limitation of cross-examination on the issue of Kelley's memory deficiencies and mental diseases was clear error, violating both Manocchio's Sixth Amendment right to confront the witnesses against him and Art. I, Sec. 10, of the Rhode Island Constitution.

Id. (emphasis supplied).

"The defense was not seeking inadmissible expert testimony from a lay witness about a medical diagnosis. Instead the defense sought the facts underlying the medical conclusion. Kelley was fully competent to describe his memory problems, to detail his symptoms, and to testify that he was being treated by a doctor. This testimony would have been both admissible and highly relevant to an assessment of the witness' credibility. It could have been devastating if Kelley admitted he was having problems distinguishing fact from fiction or that he believed things to have happened that he later found to be figments of his imagination.

Notwithstanding the Rhode Island Court's citation to its "per se error" cases "for guidance," in this case it found palpable prejudice on the record before it.

C. *The Supreme Court has Not Adopted a Rule of Per Se Reversible Error Which Excludes Consideration of Prejudice.*

Every Rhode Island case to use the phrase "per se error" has stressed that the confrontation question at issue 1) involved cross-examination of a critical state's witness, usually the sole eyewitness to the offense; and 2) that the restriction on cross-examination was so extreme as to totally or virtually bar a plainly significant line of impeachment. In *Parillo* the Rhode Island Court defined its rule as follows: "we have adopted a per se error rule in reviewing cases in which a trial justice totally precludes cross-examination by defense counsel of the state's key witness on the issues of motive or bias." *State* v. *Parillo, supra* at 1357. Similarly, in *State* v. *Freeman, supra* at 1154 the court stressed that "because . . . [the sole eyewitness'] credibility was the vital element in establishing the defendant's guilt, the trial justice, by totally precluding the defendant from raising and probing the issues of motive, bias, or prejudice, effectively cut off the defendant's right to test . . . [the sole eyewitness'] credibility fully and adequately." *DeBarros* is the same: "(i)n that case [*DeBarros*] the defendant was totally precluded from cross-examining a crucial witness in respect to the issue of bias." *State* v. *Freeman, supra*. Repeatedly these cases emphasize that they involve impeachment of "the sole eyewitness to the events immediately preceding . . . [the victim's] death" whose credibility is the "pivotal element" in the state's case. *State* v. *Freeman, supra* at 1153; *accord, State* v. *Parillo, supra* at 1357-1358.

The proof of the limited extent of this "rule" lies in the cases where it was not applied. Thus, in *State* v. *Soto*, 477 A.2d 945 (R.I. 1984), the Rhode Island Court found an erroneous limitation of cross-examination to be "rendered harmless, . . . by virtue of the full cross-examination ultimately permitted on this issue." *See also*, *State* v. *Anthony*, 422 A.2d 921, 925 (R.I. 1980) (finding harmless a restriction on the cross-examination where witness adequately impeached as to bias). Indeed the court has repeatedly stated that where cross-examination in a particular key area is not completely, or nearly completely foreclosed, it would apply a classic harmless error analysis. *E.g.*, *State* v. *Parillo*, *supra* at 1358 n.5; *State* v. *DeBarros*, *supra* at 552.

Rhode Island has made prejudice an intrinsic part of the determination of error in those situations where, because of the extreme nature of the limitation on cross-examination, a separately-defined assessment of prejudice would be unnecessary. In the present case the trial court virtually precluded cross-examination of the state's only significant witness in an area universally recognized to be highly relevant to credibility. To the degree the Supreme Court of Rhode Island actually employed a so-called "per se error" rule — and respondent contends that the decision below was grounded on a finding of actual prejudice — its holding was fully consistent with *Davis* v. *Alaska*, 415 U.S. 308 (1974) and other cases from this Court construing the Sixth Amendment to the United States Constitution.

II. This Case will Not be Controlled by a Decision in *Delaware* v. *Van Arsdall*, No. 84-1279 and Should Not be Held in Abeyance Pending Decision in that Case.

In *Delaware* v. *Van Arsdall*, No. 84-1279, this Court will consider the question of whether an erroneous restriction of

cross-examination requires automatic reversal without reference to whether the defendant was actually prejudiced by the error. As demonstrated above, this case does not involve this issue. Rhode Island's use of the term "per se error" necessarily includes an assessment of prejudice; and in the present case the Rhode Island Court fully demonstrated the prejudice flowing from the erroneous restriction of cross-examination at issue here. *Van Arsdall* will not control the decision in this case and provides no reason to grant certiorari to review a confrontation case which is remarkable only for the extreme prejudice resulting from the trial error.

III. The Decision of the Supreme Court of Rhode Island Rests Upon Independent and Adequate State Law Grounds.

A. *The Issue Presented by the Petition for Certiorari was Not Adequately Raised Below.*

The state filed a sixty-two (62) page brief in the Supreme Court of Rhode Island but it never made any specific claim that the restriction of cross-examination was harmless error in light of other particular instances where Kelley's memory was shown to be deficient. Instead it argued that the trial court did not abuse its discretion to limit cross-examination. *See, State's Brief*, p. 20-25. At oral argument the state invited the court to "undertake a careful reading of the transcript in this case" (A. 14), asserting without particularization that the review would show numerous instances in which Kelley admitted his inability to remember specific details.[10] But it was not until

[10] As noted *infra*, these instances were neither particularly numerous nor surprising in light of the fifteen-year delay between the commission of the

its petition for reargument that the state finally challenged the so-called "per se error" rule and cited to specific portions of the transcript in support of the contentions it now makes (A. 11 *et seq.*).[11]

There is no way of knowing whether the Rhode Island Court took the state up on its oral invitation to read the nearly two thousand (2,000) page transcript in this case. But the opinion below certainly suggests that it carefully reviewed Kelley's cross-examination enroute to its finding of patent error in the limitation of cross-examination. What is clear is that the Supreme Court of Rhode Island has a long-standing rule of practice that it will discount arguments which do not contain adequate supporting authority. *E.g.*, *Berberian* v. *New England Tel. & Tel. Co.*, 117 R.I. 629, 369 A.2d 1109 (1977); *Mercurio* v. *Fascitelli*, 116 R.I. 237, 354 A.2d 736 (1976); *Walmac Co.* v. *Zurich Ins. Co.*, 114 R.I. 410, 333 A.2d 686 (1975). Moreover the court will not be obligated to consider record evidence when a party fails to specify where in the transcript it can be found. *Wayne Distributing Co.* v. *Schweppes U.S.A. Ltd.*, 116 R.I. 108, 352 A.2d 625 (1976).

The state failed to comply with these procedural rules when it neither challenged the "per se error" rule prior to decision nor cited to specific transcript pages in support of its contentions. This failure alone warrants denial of the petition. *See*, *Henry* v. *Mississippi*, 379 U.S. 443 (1965); *cf.*, *Hansen* v.

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offense and the trial of this matter. Under the circumstances, Kelley's testimony was remarkably detailed, so detailed in fact that as the Rhode Island Court remarked, one might fear that it "involved far more recitation than recollection." (A. 10.)

[11] The state can hardly claim surprise at the citation in the opinion below to Rhode Island's "per se error" decisions. These decisions, and *State* v. *Parillo*, *supra* in particular, were discussed at length in the briefs submitted to the Supreme Court of Rhode Island. As noted *infra*, however, the discussions focused on the issue of whether cross-examination was unduly restricted and not on the appropriate test for reversible error.

Denckla, 357 U.S. 235 (1958) (Court may refuse to entertain federal questions raised for first time on petition for rehearing).

B. *The State Court Decision was Based on Art. I, Section 10 of the Rhode Island Constitution as an Alternative Ground of Decision.*

A state may afford its citizens greater protection under state constitutional provisions than this Court has determined must be provided under federal constitutional provisions. Indeed, "'[i]t is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions.'" *Michigan* v. *Long*, 463 U.S. 1032, 1041 (1983) (quoting from *Minnesota* v. *National Tea Co.*, 309 U.S. 551 (1940)). *See also, Oregon* v. *Hass*, 420 U.S. 714, 719 (1975). As Justice Stevens noted in his concurrence in *Massachusetts* v. *Upton*, 466 U.S. 727, ___, 104 S.Ct. 2085, 2091 (1984), "[t]he states in our federal system, however, remain the primary guardian of the liberty of the people."

Consonant with these principles, this Court has long held that it cannot reach out to address federal questions raised in a state court decision where an independent and adequate basis for that decision is founded in the state court's interpretation and application of state constitutional and statutory provisions. Reaching out in such circumstances results only in impermissible advisory opinions and denigrates the integrity of the state judiciaries. *See, e.g., Herb* v. *Pitcairn*, 324 U.S. 117 (1945); *Fox Film Corp.* v. *Muller*, 296 U.S. 207 (1935).

In the present case the Supreme Court of Rhode Island explicitly based its decision on Art. I, § 10 of the Rhode Island Constitution as well as the Sixth Amendment. While it did not fit its decision formalistically to the standards of *Michigan* v. *Long, supra*, it twice stressed that its decision rested on state as well as federal grounds (A. 6, 10).

The Rhode Island Court decided this matter citing primarily to its own cases. Contrary to the suggestion in the state's petition (Pet. 6, n.2), the state and federal confrontation provisions, while textually similar, are not identical in content. Indeed Rhode Island's seminal cross-examination case, *State* v. *Myers*, 115 R.I. 583, 350 A.2d 611 (1976), was explicitly decided on the basis of the Rhode Island guarantee in preference to a claim of federal constitutional error. Since *Myers*, Rhode Island has continued to employ Art. I, § 10 in its confrontation decisions as an alternative ground of decision. *E.g.*, *State* v. *Parillo*, *supra*; *State* v. *Freeman*, *supra*; *State* v. *Anthony*, *supra*.

In light of this history, this Court should not conclude that "the State Court decided [this] case the way it did because it believed that federal law required it to do so." *Michigan* v. *Long*, *supra*. Instead it should refrain from reaching out for a federal question and deny the Petition for Writ of Certiorari.

Conclusion.

The decision of the Supreme Court of Rhode Island does not present the issue framed by the Petition for Writ of Certiorari, is correct as a matter of fact and law, presents no significant federal question for this Court to review, is based on independent and adequate state grounds, and should be deemed final under principles of federalism, constitutional restraint, and simple fairness. Accordingly, respondent respectfully requests this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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